

CLEAN WATER RULE ("WOTUS")

WRAC Meeting
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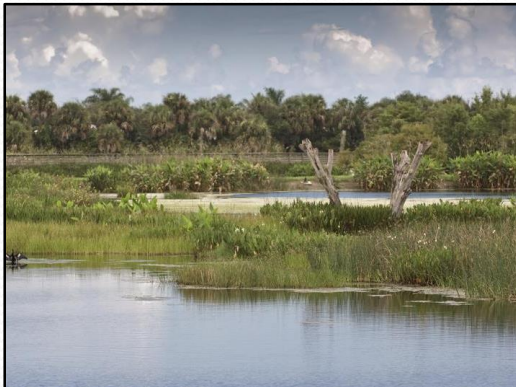
Clean Water Rule

- This rule became effective on August 28, 2015, in all but 13 states, affecting developers, farmers, and governments.
- Significant controversy surrounds the definition of Waters of the United States or WOTUS.



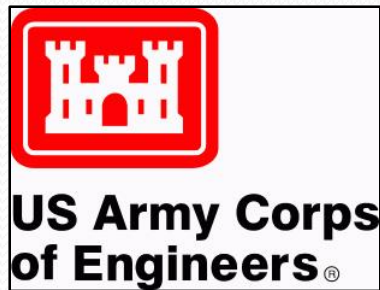
1972 Clean Water Act “Section 404”

- The Clean Water Act (CWA) was enacted “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”
- The CWA provides jurisdiction over “navigable waters” defined as “waters of the United States, including the territorial seas.”



Clean Water Act “Section 404”

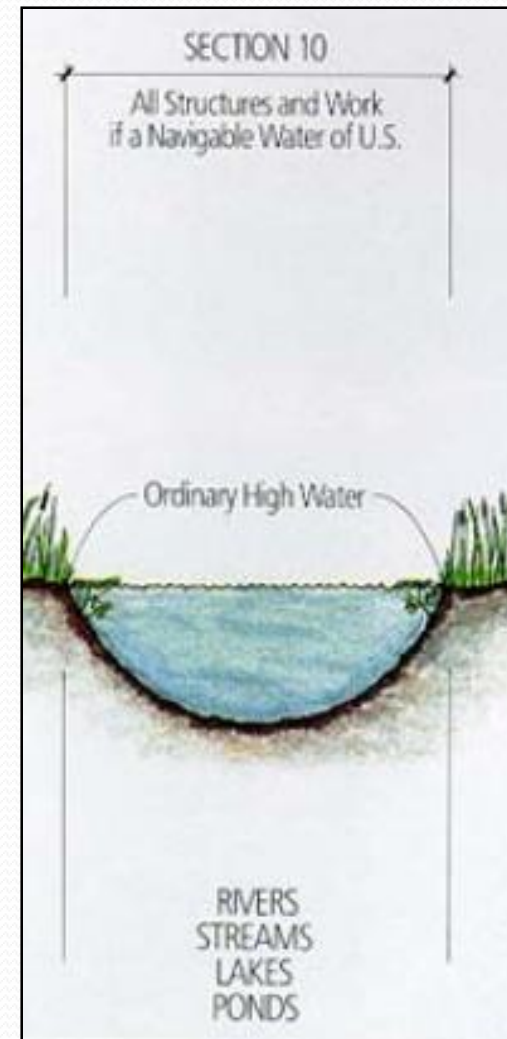
- It is the primary federal vehicle for wetland protection and regulation.
- Authority for the program is divided between the U.S. Army Corps of Engineers (ACOE) and the U.S. Environmental Protection Agency (EPA).



- Permit required for any dredging or filling in “*waters of the United States.*”

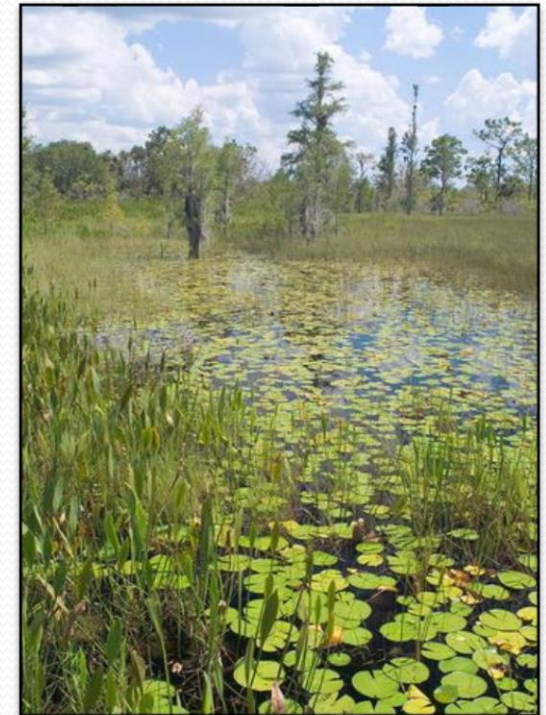
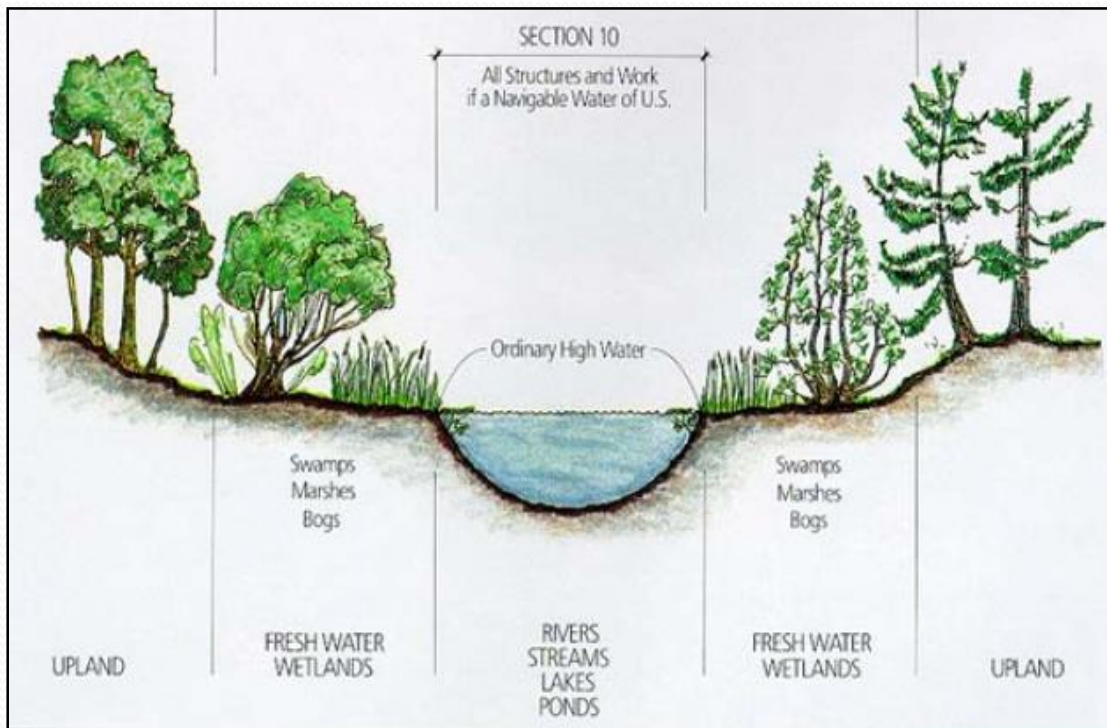
Clean Water Act “Section 404”

- Initial ACOE implementation was to narrowly interpret law and apply only to *navigable* waters.



Clean Water Act “Section 404”

- 1975 interpretation expanded to cover *wetlands*.



Clean Water Act “Section 404”

- Over time, ACOE interpreted jurisdiction to include “isolated wetlands” due to use or potential use of these areas by migratory birds.
- Migratory birds provided the link to interstate commerce.



Retention of Power

- While Congress granted regulatory authority over navigable waters to the EPA and ACOE, Congress retained the States' constitutional, sovereign responsibility over non-navigable, intrastate lands and waters.
- Congress instructed the agencies to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources”

33 U.S.C. § 1251(b)



2001 Supreme Court SWANC Decision

- Court rejected the Corps' assertion of jurisdiction over any waters "which are or would be used as habitat" by migratory birds, like seasonal ponds.
- The Court said such a regulation of isolated waters would:
 - invoke "the outer limits of Congress' power" and have the effect of "altering the federal-state framework by permitting federal encroachment upon a traditional state power" and
 - raise "significant constitutional questions" regarding the CWA's constitutionality.

Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001)

2006 Supreme Court *Rapanos* Decision

Rapanos - involved opinions by 5 Justices, with no commanding majority.

- Court again rejected the agencies' assertion of authority over non-navigable, intrastate waters that are not significantly connected to navigable, interstate waters.

Rapanos v. United States, 547 U.S. 715 (2006)



Justice Kennedy

- Justice Kennedy, writing only for himself, explained that the agencies' jurisdiction extends only to primary "waters that are navigable in fact or that could reasonably be so made" and secondary waters with a "significant nexus" to primary waters.
- To satisfy that nexus, the secondary waters must "significantly affect the chemical, physical and biological integrity" of primary waters.



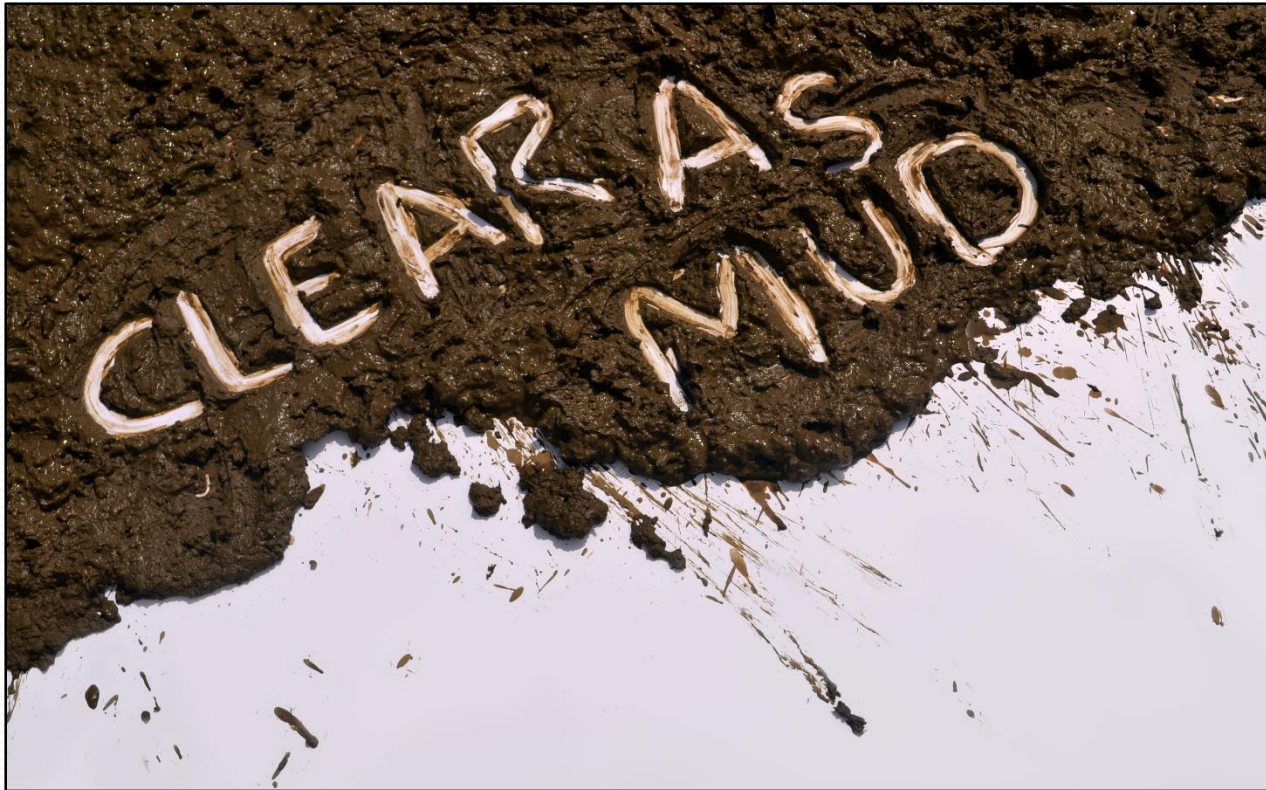
Scope of Jurisdiction

- Supreme Court cases affirmed that the geographic scope of the CWA reaches beyond waters that are navigable in fact.
- The confusion has been, however, what waters are intended to be included under CWA jurisdiction. How far does jurisdiction extend?





Critics Contended Jurisdiction



ACOE / EPA Guidance

- ACOE and EPA issued two memoranda in 2007 and a guidance document in 2008 to address which waters are subject to CWA 404 jurisdiction.
- These documents did not end the confusion and were criticized:
 - The documents are lengthy and cumbersome;
 - Lack of consistency across districts; and
 - Decision making is still very subjective.

First Rule Attempt

In April, 2014, the ACOE and EPA published a draft rule entitled “Definition of Waters of the United States under the CWA.”

- The purpose was to reduce the number of case specific evaluations on jurisdiction; and
- Proposed to define WOTUS and provide other definitions to offer clarity.



Opposition

There was major opposition to the rule including:

- Unless specifically excluded, additional ditches would be jurisdictional;
- Expansive definition of tributaries;
- All wetlands in a floodplain would be jurisdictional because they would be adjacent;
- How will “neighboring” and “adjacency” be determined?

Opposition

- States contended that the rule “impermissibly seeks to broaden federal authority” encroaching on state authority over land and water resources and will have an adverse economic impact.
- Many expressed concern about the financial impact of the rule.
- The National Association of Counties, the American Farm Bureau and others expressed concern that jurisdiction would increase over ditches.

Publication of Final Rule

- On June, 29, the EPA and ACOE published a final rule defining the scope of waters protected under the CWA.
- No further comment period was provided.
- This rule became effective on August 28, 2015, in all but 13 states.



Specific Exclusions

In an attempt to address comments, the rule provides exclusions from the definition of “waters of the United States.” Exclusions include:

- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirement of the CWA;
- Prior converted cropland;
- Groundwater, including groundwater drained through subsurface drainage systems; and
- Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

Ditches

Some ditches are also excluded. The excluded ditches include:

- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary;
- Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or which drain wetlands; and
- Ditches that do not flow, either directly or through another water, into certain identified waters.

Impact to the District's Restoration Projects

- The ACOE has exerted jurisdiction over the majority of the District's restoration projects.
- It is unclear how the rule will apply to new District projects.
- New projects will be evaluated on a case-by-case basis.
- District is coordinating with the ACOE to help determine the application of the rule to new District projects.

Florida Files Suit

- At least 27 states have filed suit.
- On June 30, 2015, Florida Attorney General Bondi joined a bipartisan lawsuit challenging the rule in U.S. District Court in Georgia. (Florida, Georgia, West Virginia, Alabama, Kansas, Kentucky, South Carolina Utah, Wisconsin)
- The suit alleges that the new rule will supplant Florida's constitutional right to govern much of its own state water.

Expansion Challenged in Lawsuit

- The suit alleges that intrastate waters and some wetlands will now be covered, including roadside ditches, ephemeral streams, creeks, ponds, and streams where there was historical flow.
- The rule's coverage of tributaries and all adjacent waters exceeds the agencies' statutory authority and violates the constitution.
- Case-by-case coverage of other waters exceeds the agencies' statutory authority and violates the constitution.
- The rule will negatively affect the implementation of Florida's water quality programs.

Injunction Granted in North Dakota

- U.S. District Court in North Dakota issued a preliminary injunction delaying the implementation of the rule in 13 states. (Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North & South Dakota & Wyoming)
- Judge said these states demonstrated that they'll face irreparable harm in the absence of an injunction.
- Similar motions were denied in the U.S. District Courts in Georgia and West Virginia based on jurisdictional issues.

Effect of the Rule

In conclusion,

- Confusion continues to exist.
- The impact will be somewhat based on how it is applied by the ACOE's District offices.
- Consistency between the ACOE's District offices will be a major factor influencing whether or not jurisdictional uncertainty is reduced.



What is Considered a WOTUS?

1. All waters currently used, used in the past, or may be susceptible to use in interstate or foreign commerce, including tidal waters (frequently referred to as traditional navigable waters (TNWs));
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of waters identified in (1)-(3) above;
5. All tributaries of waters identified in (1)-(4) above;
6. All waters, including wetlands, adjacent to a water identified in (1)-(5) above; and
7. On a case-specific basis, other waters, including wetlands, that alone or in combination with other similarly situated waters in the region have a significant nexus to a water identified in (1)-(3) above.

Tributary Definition

Water with a bed and banks and ordinary high water mark which contributes flow directly or through other water bodies to waters in (1)-(4) above.

- Wetlands, lakes, and ponds can be tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow.
- Water does not lose its tributary status if there are man-made breaks (such as bridges, culverts, pipes, dams) so long as bed and bank and ordinary high water mark can be identified upstream of the break.
- A tributary can be natural, man-altered, or man-made and includes rivers, streams, lakes, impoundments, canals, and ditches (unless excluded).
- The proposed rule defines ditches as jurisdictional tributaries (unless excluded).

Adjacent Water

Adjacent waters, including wetlands, are jurisdictional. Bordering, contiguous, or neighboring waters separated from other WOTUS by dikes, or barriers are adjacent waters.

- Neighboring means waters located within a riparian area or floodplain or waters with a shallow subsurface connection or confined surface hydrologic connection.
- Riparian areas are transitional areas between water and land where surface or subsurface hydrology influences the ecological process and plant community of the area.
- Floodplain is an area bordering inland or coastal areas that is inundated during periods of moderate to high water flows. Proposed rule does not define flood interval, but leaves up to agencies' "best professional judgment."

Significant Nexus Definition

- Means water, including wetlands, either alone or in combination with other similarly situated waters in the region significantly affects water identified in (1)-(3) above.
- Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together so that they can be evaluated as a single landscape unit. Proposed rule does not define "single landscape unit."
- For an effect to be significant, it must be more than speculative or insubstantial.

Exclusions in Proposed Rule

- Waste treatment systems designed to meet the requirements of the CWA;
 - Prior converted cropland;
 - Ditches excavated wholly in uplands that drain only uplands and have less than perennial flow;
 - Ditches that do not contribute flow, either directly, or through another water, to a water identified in paragraphs (1)-(4) above;
 - Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
 - Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
 - Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
 - Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
 - Water-filled depressions from construction;
 - Groundwater, including groundwater drained through subsurface draining systems; and
 - Gullies, rills, and non-wetland swales.
- Although these features (certain ditches, groundwater, gullies, rills, and non-wetlands, etc.) are not WOTUS under the proposed rule, they can serve to establish a connection under the proposed rule (*e.g.* connection that demonstrates adjacency to jurisdictional or demonstrates that an "other water" has a significant nexus to a (a)(1) - (3) waters).

Interpretative Rule (IR) Governing Exemptions for Farming, Ranching, and Forestry Provides Insufficient Protections

The proposed rule imposes a new regime even as it continues existing statutory and regulatory exemptions from Section 404 permitting requirements for normal farming, silviculture and ranching practices where these activities are part of an ongoing farming, ranching or forestry operation. In tandem with the proposed rule, the agencies have issued an "interpretive rule" that was made immediately effective, without advance notice and comment.

- The IR purportedly expands the list of existing agricultural exemptions to include an additional 53 activities that are exempt from permitting requirements so long as they are conducted consistent with Natural Resources Conservation Service (NRCS) conservation practice standards - a requirement that is nowhere found in the law.
- EPA and the Corps will enter into a Memorandum of Agreement with the NRCS to develop and implement a process for identifying, reviewing, and updating NRCS agricultural conservation practices and activities that would qualify for the exemption.